IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6621

GILBERT FRANKLIN BECK,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

REPLY BRIEF OF PETITIONER

Of Counsel:

JOHN A. HERFORT
JAY WISHINGRAD
Kaye, Scholer, Fierman,
Hays & Handler
425 Park Avenue
New York, New York 10022
Tel. (212) 759-8400

JOHN L. CARROLL
Southern Poverty Law Center
1001 South Hull Street
Montgomery, Alabama 36104
Tel. (205) 264-0286

DAVID KLINGSBERG
425 Park Avenue
New York, New York 10022
Tel. (212) 759-8400

Attorney for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6621

GILBERT FRANKLIN BECK,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

REPLY BRIEF OF PETITIONER

I.

THE INCREASED RISK OF UNRELIABLE FACT-FINDING CREATED BY ALABAMA'S STATUTORY PRECLUSION OF LESSER-OFFENSE VERDICTS IN CAPITAL CASES IS NOT OFFSET BY THE FACTORS ON WHICH RESPONDENT RELIES AND, IN A CAPITAL CASE, THAT RISK IS CONSTITUTIONALLY INTOLERABLE UNDER THE DUE PROCESS CLAUSE.

1. The Substantial Risks Of Error Created By Alabama's Law

(a) Respondent's basic argument is that the risk of fact-finding error caused by Alabama's statutory preclusion of lesser-offense verdicts in capital cases is "speculative." R.B. 17. This argument is premised on the erroneous assumption that, in the absence of hard factual proof, this Court cannot find that preclusion of lesser-offense verdicts creates a risk of erroneous jury convictions. Since no other state has ever disallowed lesser-offense verdicts and, therefore, there is no evidence concerning any state's experience without the procedure, such a demonstration would be impossible.

More importantly, such a factual demonstration is unnecessary as a matter of law. This Court made clear in *Estelle v. Williams,* 425 U.S. 501 (1976), that the determination as to whether a particular procedure poses an "unacceptable risk" of "impermissible factors coming into play" (*id.* at 505) does not require actual proof that jury deliberations were tainted. As Chief Justice Burger explained in *Estelle*:

> "The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. [Citations omitted]. Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle and common human experience." *Id.* at 504.

Reason, principle and common human experience were applied by the Court in *Keeble v. United States,* 412 U.S. 205 (1973), to conclude that without a lesser-offense instruction there is a "substantial risk" that "[w]here one of the elements of the offense charged remains in doubt, but the

defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." 412 U.S. at 212-13.

Contrary to respondent's assertion, this risk is magnified in a capital case such as petitioner's. R.B. 30. As compared with *Keeble,* where the lesser offense was simple assault, the enormity of the relevant lesser offense of felony-murder will increase the jury's reluctance to acquit and thereby interfere with their deliberations. To make matters worse, the trial judge here instructed the jury that if the defendant is acquitted, he could not be retired for any crime he may have committed against the victim. A. 9.

(b) In order to conclude that lesser-offense verdicts create risks of error that threaten intolerable consequences in capital cases, it is unnecessary to find, as respondent suggests, that the jury intentionally will violate its oath and willfully fail to follow its instructions. R.B. 28-29. If it were, then this Court's many Due Process rulings on "impermissible influences" on jury behavior, including *Estelle,* would be unnecessary. As Justice Stewart has stated:

> "Why, if juries do not sometimes act improperly, does the Constitution require protection from inflammatory press coverage and *ex parte* influence by court officers? Cf., *e.g., Sheppard v. Maxwell,* 384 U.S. 333; *Parker v. Gladden,* 385 U.S. 363; *Turner v. Louisiana,* 379 U.S. 466. Why, if juries must be presumed to obey all instructions from the bench, does the Constitution require that certain information must not go to the jury no matter how strong a cautionary charge accompanies it? Cf. *e.g., Bruton v. United States,* 391 U.S. 123; *Jackson v. Denno,* 378 U.S. 368. Why, indeed, should we insist that no man can be constitutionally convicted by a jury from which members of an identifiable group to which he belongs have been systematically excluded?

Cf., *e.g., Hernandez v. Texas,* 347 U.S. 475." *Johnson v. Louisiana,* 406 U.S. 356, 398-99 (1972) (Stewart, J., dissenting).

The point is that there is a risk that jurors will be influenced, however subconsciously, to resolve doubts on the critical issue of intent in favor of conviction by the presence of an unnecessary distorting factor — here, the prospect of acquitting and freeing a guilty defendant due to their inability to convict of the serious, lesser offense he admittedly committed. As the Court stated in *Keeble,* the proper focus is on "the substantial risk that the jury's practice will diverge from theory." 412 U.S. at 212.

2. The Alleged Offsetting Factors

(a) Respondent argues that the risk of erroneous conviction from the preclusion of lesser-offense verdicts if offset by the fact that the jury is made aware that this is a capital case. *See* R.B. 17-21. It does not, however, make the risk acceptable in a capital case to hope that the jury's reluctance to see the death penalty imposed will compensate for another factor that unfairly and unnecessarily tilts the jury towards conviction. This argument flies in the face of the Court's consistent pronouncements that capital cases demand especially high standards of Due Process. *See* cases cited at P.B. 32-34.

In any event, respondent's so-called historical evidence for this contention is inapposite. The language respondent cites from this Court's opinions regarding jury nullification on the issue of guilt relates only to the historical experience of states with mandatory death sentences, and not to the experience of states, like Alabama, where the death penalty

was imposed on a discretionary basis. R.B. 18-19.[1] Since, under a non-mandatory statute, there is the possibility of not sentencing the defendant to death, there is less reason for jury nullification on the issue of guilt. Furthermore, given the 96% conviction rate under Alabama's law, respondent's contention regarding jury leniency is of doubtful validity.

(b) Although the jury accompanies its finding of guilt with a statement fixing the punishment at death, "the trial court and not the jury actually makes the sentencing determination." R.B. 22 n.11. Moreover, it is extremely doubtful that Alabama juries are misled — or, as respondent puts it, "encouraged" — into thinking they have actual sentencing authority and that this somehow offsets the risk of erroneous conviction. R.B. 21-22. The fact that the judge, not the jury, has sentencing authority was well publicized before trial in the Gadsden, Alabama community where petitioner's crime was committed and where he was tried. R. 944, *The Gadsden Times,* Nov. 10, 1976; R. 947, *The Gadsden Times,* Nov. 24, 1976. Accordingly, the statement in respondent's brief that "there is no indication in the record that the jury otherwise knew that the judge would ultimately determine the sentence" is erroneous. R.B. 22 n.11. In any event, the notion that the validity of Alabama's law must depend on the deception of its capital jurors underscores the inadequate, self-contradictory nature of respondent's ap-

[1]Respondent quotes Woodson v. North Carolina, 428 U.S. 280, 303 (1976), but the Court's full statement was that "[i]n view of the historical record, it is only reasonable to assume that many juries *under mandatory statutes* will continue to consider the grave consequences of conviction in reaching a verdict." R.B. 21 (Emphasis added to show omission by respondent). Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note,* 54 B.U.L. Rev. 32 (1974), on which respondent also relies, concerned only mandatory capital punishment statutes. R.B. 17-18.

proach to the fact-finding process in capital cases.

(c) Respondent stresses the availability of a mistrial as a special procedural protection which substitutes for the lesser-offense verdict. R.B. 22-25. The mistrial procedure is inapplicable. It applies where the jurors are not unanimous and disagree about whether defendant is guilty of the capital offense charged. Contrary to respondent's suggestion, a mistrial is inappropriate where the jurors are all in agreement "that the defendant was not guilty of a capital offense but was guilty of a serious non-capital offense . . . ." R.B. 24.

Respondent's belief that the jurors would invoke the "mistrial option" in order to ensure a subsequent conviction of a lesser offense on which they all agree is also unrealistic. R.B. 22-25. It presupposes that when the jurors all agree that defendant is only guilty of a lesser-included offense, (a) the jurors will falsely advise the trial judge that there is a disagreement, *i.e.*, that some jurors believe the defendant is guilty of the capital offense charged, while others vote for acquittal; and (b) the jurors will undertake this duplicitous action based on their anticipation that it will set in motion a tenuous chain of events which, even under the trial judge's instructions, may not eventuate.[2] There is no reason for the jury to have any assurance that a mistrial will lead to a reindictment and trial on a lesser-offense charge which, in turn, will result in conviction on that charge. Respondent's scenario is palpably ridiculous because it assumes a degree of sophistication and deviousness on the part of jurors that is

[2]As the trial judge instructed the jury

"[I]n the event that all of your number cannot agree upon a verdict, [a] judgment of mistrial must be entered by the Court and . . . Defendant *may* be tried again for the aggravated offense or *may* be reindicted for an offense wherein the indictment does not allege an aggravated circumstance." A. 13 (emphasis added).

illusory. It is also inconsistent with respondent's repeated assertions that jurors can be trusted to obey their oaths. R.B. 28-31.

Finally, the mistrial procedure is not a special safeguard which provides substitute protection for the preclusion of lesser-offense verdicts in capital cases. Historically, the mistrial procedure in the event of jury disagreement has existed alongside lesser-offense verdicts,[3] and is currently available in Alabama non-capital trials where the lesser-offense instruction also is allowed.[4] Moreover, contrary to respondent's statement, the trial jury in *Keeble* was instructed that it had the option, by virtue of non-unanimity, of not reaching a verdict.[5] R.B. 31.

(d) The availability of a separate sentencing hearing, relied on by respondent, does not cure the defects in the guilt-finding process created by Alabama's statute. *See* R.B. 25-28. The Court has long held that criminal defendants, particularly in capital cases, are entitled to every safeguard

[3]*E.g.*, United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); Logan v. United States, 144 U.S. 263 (1892).

[4]Parham v. State, 285 Ala. 334, 231 So. 2d 899 (1970); Alford v. State, 243 Ala. 404, 10 So. 2d 373 (1942).

[5]The *Keeble* jurors were specifically instructed that none of them should "surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of verdict." Appendix, Keeble v. United States, October term, No. 72-5322, at 14. Under the federal law applicable in *Keeble*, the necessary result of a mistrial based on jury non-unanimity is that the defendant, as is the case under Alabama's law, may be retried for the offense charged in the initial trial or a lesser offense. *E.g.*, Illinois v. Somerville, 410 U.S. 458, 463 (1973); Howard v. United States, 372 F.2d 294 (9th Cir.), *cert. denied*, 388 U.S. 915 (1967). Thus, the possibility of jury disagreement was accorded no significance in this Court's ruling in *Keeble*; and the parallel instruction in this case is no more meaningful.

designed to promote reliable fact-finding at the guilt stage.[6] Indeed, respondent cites no case where the possibility of the trial judge adjusting the sentence was found by a court to compensate for the denial of Due Process at the guilt-finding stage.

In any event, whatever corrective potential may exist in Alabama's capital sentencing scheme is vastly exaggerated.[7] Without a finding of guilt on a capital charge there could be no death sentence. Moreover, respondent admits that "the same evidence which convinces the jury beyond a reasonable doubt of the defendant's guilt of the capital offense *will usually* also convince the trial court judge of the existence of at least one aggravating circumstance" sufficient to support a death sentence under Alabama's law. R.B. 57-58 (emphasis added). Respondent does not contest the fact that in the first three years of the statute's operation without the lesser-offense option, 82% of those capital defendants found guilty by a jury were sentenced to death by the trial judge.

3. The Due Process Criteria

Respondent has failed to undermine the long-standing history and virtually unanimous adoption of lesser-offense

---

[6]Powell v. Alabama, 287 U.S. 45, 71 (1932); Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring), cited approvingly in Gregg v. Georgia, 428 U.S. 153, 187 (1976). *See also* Lockett v. Ohio, 438 U.S. 586, 604 (1978).

[7]The most that a guilty capital defendant can hope for is life imprisonment without a parole, a sentence which is greater than any Alabama non-capital defendant — including one guilty of first-degree murder — can receive. §13-1-74, §13-11-1, Code of Alabama (1975); §13A-6-2(c), §13A-5-30, Code of Alabama (1978).

verdicts, along with the well-reasoned protections they afford, which fully meet the standards on which this Court has traditionally relied in Due Process cases. *See* P.B. 34-50.[8] Respondent cites *Keeble, supra,* 412 U.S. at 208, to the effect that the lesser-offense doctrine was initially developed at common law to assist the prosecution. R.B. 39. But the court in *Keeble* went on to say that "it is now beyond dispute that defendant is entitled to an instruction on a lesser included offense" and that "the defendant's right to such an instruction has been recognized in numerous decisions of this Court." *Id.* at 208.

Moreover, respondent does not contest the fact that such verdicts have been deemed a vital protection to defendants, especially in capital murder cases, as far back as the nineteenth century. *McGautha v. California,* 402 U.S. 183, 198 (1971); *Stevenson v. United States,* 162 U.S. 313, 314, 315, 323 (1896); *Hopt v. Utah,* 110 U.S. 574, 582-83 (1884); *Brown v. State,* 109 Ala. 70, 77, 20 So. 103 (1896).

---

[8]Respondent relies (R.B. 39-41) on Williams v. Florida, 399 U.S. 78 (1970) and Johnson v. Louisiana, 406 U.S. 356 (1972) dealing with the less-than-unanimous verdict and less than 12-man jury scheme, neither of which in these cases was applicable to capital juries. This Court, in upholding six-man juries, specifically relied on the fact that the use of 12-man juries (which petitioner there asserted was the constitutional norm) was no more than a "historical accident" based "on little more than mystical or superstitious insights into the significance of '12'," that at least nine states had juries of fewer than 12 for criminal cases, and that the "reliability of the jury as a fact-finder hardly seems likely to be a function of its size." 399 U.S. at 88-90, 98-99 n.45, 100-01. In Johnson v. Louisiana, *supra,* 406 U.S. at 359-63; *see also id.* at 368, 372, 377 (Powell, J., concurring), the Court concluded that non-unanimous guilty verdicts did not undermine the beyond-reasonable-doubt standard; that prior decisions of the Court had refused to invalidate non-unanimous jury verdicts, and that unanimity had been abandoned in England (United Kingdom Criminal Justice Act of 1967, §13) and criticized by the commentators.

In the last analysis, it makes no difference that the lesser-offense option may assist prosecutors who, as representatives of the people and officers of the court, have an interest identical to defendants in precise, accurate jury fact-finding untainted by impermissible influences and substantial risks of error.[9]

Much is made of the fact that this Court has never ruled on the constitutional question presented by this case. R.B. 33-37. As Justice Harlan stated on the occasion of this Court's ruling on the reasonable doubt standard, it is "only because of the nearly complete and long-standing acceptance" of that procedure "by the States in criminal trials that the Court has not before today had to hold explicitly that due process as an expression of fundamental procedural fairness," requires it. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

Respondent also fails to demonstrate, as it must, that eliminating the procedure by statute for capital defendants would provide significant countervailing public benefits (*In re Winship, supra*, 397 U.S. at 366), and that the risks of fact-finding error caused by Alabama's procedure cannot "be avoided." *Estelle v. Williams, supra*, 425 U.S. at 505. Those risks are easily avoided by preserving the availability of lesser-offense verdicts without compromising Alabama's goal of having an adequate, constitutionally acceptable system for the imposition of capital punishment. Respondent

[9]Respondent's further suggestion (R.B. 34-35) that the three dissenting Justices in *Keeble* implicitly took a position "contrary to petitioner's position in the present case" is a misreading of Justice Stewart's dissent, which merely noted that if a particular lesser-offense is not a federal crime, a finding of guilt for such a crime in a federal court would be contrary to the rule that a federal criminal court's "limited jurisdiction" extends only to statutory crimes as defined by Congressional enactments. 412 U.S. at 215-17

concedes that the elimination of lesser-offense verdicts is unnecessary to meet the constitutional requirements set forth in *Furman v. Georgia*, 408 U.S. 238 (1972). R.B. 45. As shown in the next two Points, respondent's alleged goal of exceeding constitutional requirements is illusory and is actually contrary to this Court's post-*Furman* decisions.

II.

RESPONDENT HAS FAILED TO SHOW WHY ALABAMA'S LAW SHOULD NOT BE INVALIDATED PURSUANT TO THIS COURT'S EIGHTH AMENDMENT RULINGS IN GREGG v. GEORGIA, WOODSON v. NORTH CAROLINA AND LOCKETT v. OHIO.

1. The Need To Focus On The Particular Circumstances Of The Capital Crime Charged

The basis of respondent's Eighth Amendment argument is that the statutory preclusion of lesser-offense verdicts follows the alleged goal of *Furman* to eliminate discretion. R.B. 55. The flaw in this argument is its failure (*see* R.B. 55) to deal with the principle enunciated by this Court in *Woodson v. North Carolina, supra*, 428 U.S. at 304-05, and reiterated in *Lockett v. Ohio, supra*, 438 U.S. at 604, that the "fundamental respect for humanity underlying the Eighth Amendment" and the "corresponding difference in the need for reliability" in capital cases makes consideration "of the circumstances of the particular offense" a constitutional requirement.

Applying this principle, the Court held in *Woodson* that the sentencing authority's decisions in a capital case must

have room for discretion based on standards similar to those employed at the guilt-finding stage to assist the jury in its fact-evaluation process. *Woodson v. North Carolina, supra*, 428 U.S. at 304-05.[10] The Court in *Woodson* said that discretion is inevitable and rather than attempt to eliminate it, there should be "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." 428 U.S. at 303. Lesser-included offense instructions allow the jury to conform its verdict to the offense actually committed; absent that procedure, capriciousness is likely to result from the irrational choice of either acquittal of a defendant guilty of a serious offense, or conviction of an offense which the defendant did not commit. By unduly limiting fact-finding discetion in capital cases and eliminating a long-established standard for guiding its exercise, Alabama's law has the same defect as the statutes invalidated in *Woodson* and *Lockett*.[11]

---

[10]*Accord*, Gregg v. Georgia, *supra*, 428 U.S. at 193 (noting that it "would be virtually unthinkable to follow any other course in a legal system" than to give juries "careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. . . . It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations."). Lesser-included offenses are an historically sanctioned means for arriving at a careful, precise judgment on the key issue in a capital case.

[11]Contrary to respondent's contention, there is no support in Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976) for abolition of lesser-offense verdicts. R.B. 46. *Roberts*, which dealt with Louisiana's mandatory death sentence law, did not condemn the practice of allowing juries to return lesser-offense verdicts. *Roberts* merely said that by requiring instructions to juries permitting them to return lesser-offense verdicts in capital cases, even where "there is not a scintilla of evidence to support the lesser verdicts," Louisiana's law had precisely the same defect of standard-less jury decision-making on the life-death question (given Louisiana's mandatory sentence following a finding of guilt on a

(continued)

2. Eliminating Lesser-Offense Verdicts As An Element Of A "Totally Alien" And "Unconstitutional" System Of Criminal Justice

Contrary to respondent's contention (R.B. 36), this Court clearly stated in *Gregg v. Georgia, supra*, 428 U.S. at 199-200 n.50 (1976), that a system for the imposition of capital punishment, which, among other things, abolished the lesser-offense option, would be unconstitutional. The Court dealt in turn with each of the four "opportunities for discretionary action" alleged as defects in Georgia's capital punishment process (*i.e.*, prosecutorial discretion as to what crime to charge, plea bargaining, lesser-offense verdicts, and post-sentence executive commutation). *Id.* at 199. Plainly the Court's reference (428 U.S. at 199-200 n.50) to discretion at the trial stage where a "jury refuse[s] to convict even though the evidence supported the charge" related to the availability under Georgia's law of lesser-offense verdicts. The Court made clear that a "system" which eliminated the four opportunities for discretion, including lesser-offense verdicts, "would be totally alien to our notions of criminal justice" and "would be unconstitutional." *Ibid.*[12]

(footnote continued from preceding page)

capital charge) as its pre-*Furman* law, which permitted juries, without standards, to return a verdict of "guilty without capital punishment in any murder case." 428 U.S. at 334. Unlike Louisiana, Alabama's standard for lesser-offense verdicts in non-capital cases, which is all petitioner asserts should aply, limits lesser-offense instructions to cases where there is at least some evidence supporting a lesser-offense verdict. Moreover, Alabama's death sentence provision is not mandatory.

[12]In an attempt to support the validity of Alabama's law under the Eighth Amendment, respondent argues that the law "limits the definition of capital offenses to a group of narrowly defined types of aggravated murder." R.B. 65. As explained in petitioner's main brief (P.B. 58-59), the offenses are *not* narrowly defined, but, due to the breadth of the aider

(continued)

Accordingly, Alabama's law, which represents the first step toward such a system of justice, must be held to be a constitutionally intolerable response to this Court's decision in *Furman.*

III.

RESPONDENT'S EQUAL PROTECTION ARGUMENTS FAIL TO PROVIDE A SUFFICIENT BASIS FOR SUSTAINING THE HARMFUL DISCRIMINATION AGAINST CAPITAL DEFENDANTS IN ALABAMA'S LAW.

1. Petitioner's Equal Protection Claim Is Properly Before This Court

Respondent concedes that in the state courts, at both the trial (A. 55; R. 39-45, 105) and appellate (A. 38-40) levels, petitioner timely raised federal constitutional objections under the Fourteenth Amendment to Alabama's preclusion of lesser-offense verdicts.[13] Nevertheless, respondent now

(footnote continued from preceding page)

and abettor and conspiracy doctrines, as set forth in the trial judge's instructions to the jury, to which petitioner objected (A. 5; R. 747-751), are so loosely defined that Alabama's law creates an undue risk, heightened by the absence of the lesser-offense option, that many capital defendants, such as petitioner, will receive a disproportionately heavy sentence, whereby they are sentenced to death even where they lacked any intent that the victim be killed.

[13]There is no question that the Alabama Supreme Court considered petitioner's federal constitutional claims in this case. As respondent concedes, petitioner's application to the Alabama Supreme Court specifically relied on the "14th Amendment." R.B. 43. Moreover, in its

(continued)

argues that petitioner's failure to use the phrase "equal protection" is fatal to its equal protection arguments to this Court. This argument has no support in the case-law and is contradicted by this Court's holding in *Stanley v. Illinois, 405 U.S. 645 (1972).*

In Stanley, supra, 405 U.S. at 658 n.10, the Court held that it would consider petitioner's argument that Illinois' law precluding illegitimate fathers but not mothers from receiving a hearing on parental custody claim violated both the Equal Protection Clause and the Due Process Clause, even though petitioner argued only the Equal Protection point in the state courts. Because petitioner's Equal Protection argument is related to its Due Process and Cruel and Unusual Punishment arguments, as respondent concedes (R.B. 53),[14] this Court's ruling in *Stanley,* where petitioner's Due Process and Equal Protection arguments were also related, is dispositive. *Accord, Anderson v. United States,* 417 U.S. 211, 223 n.12 (1974).[15]

(footnote continued from preceding page)

decision in this case, the Alabama Supreme Court dealt with the federal constitutional issue, holding that the law is "constitutional" (A. 53) on the authority of Jacobs v. State, 361 So. 2d 640 (Ala. 1978), *cert. denied,* 439 U.S. 1122 (1979), a case which involved only federal constitutional claims and dealt with the lesser-offense issue. Furthermore, the Equal Protection question was asserted in petitioner's application for a writ of certiorari in this Court.

[14]Due Process and Equal Protection are interrelated. *See* Mayer v. City of Cicago, 404 U.S. 189 (1971) (holding procedural deprivation to violate both Due Process and Equal Protection), Weinberger v. Weisenfeld, 420 U.S. 636 (1975) (Equal Protection secured by Due Process clause of the Fifth Amendment).

[15]The cases on which respondent relies are inapposite. R.B. 43-44. In Fuller v. Oregon, 417 U.S. 40 (1974), the issue was whether Oregon's criminal defendant cost recoupment statute violated the equal protection clause because it discriminated in favor of those found innocent and

(continued)

It is clear that petitioner's explicit objections to the constitutionality of the preclusion of lesser-offense verdicts at the trial and appellate levels on the Fourteenth Amendment ground is sufficient to enable this Court to consider petitioner's equal protection argument.

2. The "Strict Scrutiny" Test

Respondent does not even attempt to argue that Alabama's death penalty statute could conceivably survive "strict scrutiny" under the Equal Protection Clause. Instead, respondent argues that "strict scrutiny" is appropriate only where the statutory discrimination in question violates a constitutional safeguard other than the Equal Protection Clause. R.B. 52-53. If respondent were correct, applying the Equal Protection Clause pursuant to the "strict scrutiny" test would be superfluous. Rather, in *San Antonio School District v. Rodriguez,* 411 U.S 1, 38 (1973), the Court held that strict scrutiny was appropriate where a statutory classification had the effect of "*touching upon*

(footnote continued from preceding page)

against those who were found guilty. Petitioner, for the first time, raised the entirely unrelated question in this Court as to whether the statute's imposition of an obligation to repay without sifficient notice or hearing violated due process. *Id.* at 50 n.11. Unlike *Fuller,* where petitioner attacked an aspect of the Oregon law's operation which had never been considered below, petitioner has consistently objected on federal-law grounds to the lesser-offense provision in Alabama's death penalty law on Fourteenth Amendment (as well as Eighth Amendment) grounds that are all interrelated. P.B. 13-14. In Street v. New York, 394 U.S. 576, 681-85 (1969), the Court held that raising the constitutionality of the statute was sufficient, and no particular form of words or phrases was essential, *id.* at 584, so that petitioner could attack New York's anti-flag defacement statute on the "over-breadth" theory even though he did not originally raise that theory in the state courts.

constitutionally protected rights." (Emphasis added.)[16] In order to apply strict scrutiny under the Equal Protection Clause, the Court need not hold that Alabama's law violates any other constitutional provision.

There is no question that Alabama's law has the requisite effect of "touching upon constitutionally protected rights" to a fair trial. Respondent concedes that the beyond-the-reasonable-doubt standard and the right to fair fact-finding are fundamental rights to be accored strict scrutiny, and simply denies that they are adversely affected by the preclusion of lesser-offense instructions. *See* R.B. 53. In *Estelle v. Williams, supra,* 425 U.S. at 503-05, the Court held that criminal defendants have "fundamental rights" in the "fairness of the fact-finding process" and a right to have a jury decide guilt or innocence without "an unacceptable risk . . . of impermissible factors coming into play." Alabama's law creates the risk that jury deliberations will be unfairly influenced to resolve doubts on the critical elements infavor of conviction by the specter of total freedom for capital defendants who are plainly guilty of only a serious intermediate crime. *See Keeble, supra,* 412 U.S. 205. This

[16] *Accord,* Police Dept. of Chicago v. Mosley, 408 U.S. 92, 98, 101 (1972) (applying strict scrutiny to regulation of picketing on the ground that the statute was one "affecting First Amendment interests" even though the regulation was not invalid under the First Amendment); Bullock v. Carter, 405 U.S. 134, 143 (1972) (applying strict scrutiny to Texas laws requiring filing fees for candidates in election primaries even though there was no substantive violation of any constitutional right to vote or stand as a candidate for public office); Shapiro v. Thompson, 394 U.S. 618 (1969) (applying strict scrutiny to statute which burdened the right to travel, even though there was no substantive violation found of that constitutional right); Zablocki v. Redhail, 434 U.S. 374, 383-84 (1978) (applying strict scrutiny to statute affecting plaintiff's ability to marry in Wisconsin, without finding any substantive constitutional violation).

risk is unacceptable at least for capital defendants. The strict scrutiny test is particularly appropriate in dealing with fair trial rights in capital cases because, due to the uniqueness and severity of the death penalty, capital defendants have a constitutionally recognized right to procedures aimed at ensuring "a greater degree of reliability" than in non-capital cases. *Lockett v. Ohio, supra,* 438 U.S. at 605; *Gregg v. Georgia, supra,* 428 U.S. at 187; *Woodson v. North Carolina, supra,* 428 U.S. at 305.

Accordingly, the strict scrutiny test under the Equal Protection Clause is applicable here and respondent has failed to show that the statutory preclusion of lesser-offense verdicts is necessitated by a compelling state interest.

3. The Lenient Standard

Even if this Court, as respondent suggest, applies the lenient equal protection standard set forth in *McGinnis v. Royster,* 410 U.S. 263, 270 (1973), Alabama's decision to discriminate against capital defendants by denying them opportunity to receive a lesser-offense verdict must be invalidated because it lacks "some rational basis" related to a valid, "legitimate, articulated state purpose" to sustain it. As shown herein, Alabama's purpose was not valid; and the statute is not rationally related to any legitimate aim.

Respondent's argument (R.B. 45-51) that the abolition of lesser-offense verdicts will enable Alabama "to do even better" (R.B. 45) than what it perceived (erroneously) *Furman* to require is unavailing.[17] The Court made clear in

[17]This Court is not required to "accept at face value" respondent's assertion of legislative purpose. Weinberger v. Wiesenfeld, *supra,* 420 U.S. at 648 n.16. *Accord,* Eisenstadt v. Baird, 405 U.S. 438, 451 (1972); U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 536-37

(continued)

Woodson v. North Carolina, supra, 428 U.S. at 303, that the abolition of fact-finding discretion, rather than the imposition of standards to control it, was unconstitutional in a capital case. *See* Point II, *supra.*

AS held in *Jurek v. Texas,* 428 U.S. 262, 274 (1976), the contention that *Furman* endorsed abolition of jury consideration of lesser-offenses, "fundamentally misinterprets the *Furman* decision, and we reject it for the reasons set out in our opinion today in *Gregg v. Georgia, ante,* at 199." *Accord, Proffitt v. Florida,* 428 U.S. 242, 254 (1976). Moreover, the Court stated in *Gregg, supra:*

> "*Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." 428 U.S. at 199.

Accordingly, it is clear that Alabama's decision to abolish an instruction to the jury which enables it to "focus on the particularized circumstances of the crime" is not supported by a valid and legitimate purpose, but rather is a misreading

(footnote continued from preceding page)

(1973). It is logical to conclude, as the Court did in *Lockett* in reviewing the erroneous and unconstitutional responses to *Furman* of North Carolina and Louisiana, that Alabama was merely seeking to comply with what it regarded as *Furman's* mandate, and that Alabama misunderstood the decision. *Lockett v. Ohio, supra,* 438 U.S. at 597-602. For respondent now to hypothesize, without a scintilla of supporting evidence based on legislative history or any other sources, that a purpose of the law was "to do even better" than *Furman* required is simply an exercise of lawyers' imagination which must be viewed with great skepticism. R.B. 45. *E.g.,* Trimble v. Gordon, 430 U.S. 762, 774-76 (1977); Craig v. Boren, 429 U.S. 190, 199-200 n.7 (1976). As this Court made clear in McGinnis v. Royster, *supra,* 410 U.S. at 277, a statute which has only an "imaginary basis" and lacks "a clear and legitimate purpose" will not survive Equal Protection scrutiny even where strict scrutiny is not applicable.

of *Furman. See Lockett v. Ohio, supra,* 438 U.S. at 599-600.

Moreover, on its face, the abolition of lesser-offense verdicts is not a rational means of preventing arbitrariness and capriciousness in capital cases. To the contrary, Alabama's law creates arbitrariness and capriciousness by placing jurors, in capital cases only, in the unfair position of having either to acquit and free a defendant guilty of a serious intermediate offense, or to convict of a capital crime, but not convict of the precise offense committed.

The invalidity of the distinctions drawn by the Alabama law is further illustrated by the fact that only Alabama, of the more than 30 states that have capital punishment laws, precludes lesser-offense verdicts. The experience of other states is a well-established means of judging whether one state's decision to discriminate against a defined group is deemed to have a sufficient basis to satisfy the Equal Protection Clause.[18] *E.g., Stanton v. Stanton,* 421 U.S. 7, 15 (1975).

[18]The rationality of Alabama's classification is further undercut by the fact that in most other respects relating to decision-making on the issue of guilt, Alabama capital defendants and non-capital defendants are treated alike. Thus, both groups are entitled to a unanimous jury verdict (*see, e.g.,* Kirk v. State, 247 Ala. 43, 22 So. 2d 431 (1945)), both are tried pursuant to the same rules of evidence at the guilt-finding stage (§12-21-200 through §12-21-263, Code of Alabama (1975)), and both are eligible for sentencing commutation by state executives (Amendment No 38, Constitution of Alabama (1901); §15-18-100, §15-22-27, §15-22-36, Code of Alabama (1975)). This fact underscores the likelihood — unrebutted by anything presented in respondent's brief — that Alabama perceives no genuinely serious need to treat capital and non-capital defendants differently with respect to well-established procedural protections. On the other hand, if respondent's Equal Protection argument is correct, it would be equally justifiable for Alabama to institute non-unanimous juries for capital cases alone in order to prevent jury nullification or to abolish the Governor's clemency power in capital cases alone so as to promote consistency in sentencing outcomes.

Moreover, in *Lockett v. Ohio, supra,* 438 U.S. at 605, the Court, in striking down a provision precluding the sentencing authority in capital cases from weighing all the circumstances of the offense, concluded that

> "[t]he considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases."

Similarly, here the considerations that led to universal acceptance of allowing convictions of lesser offenses by all states, including Alabama, are just as important in capital cases, and no invidious discrimination against capital defendants is allowed. Respondent does not point to even a shred of evidence or to language in any of the Court's opinions which supports the distinctions they have drawn.

The absence of any reasoned basis for distinguishing between capital and non-capital defendants with respect to risks of error avoided by lesser-offense verdicts means that the statute is invalid under the Equal Protection Clause. *Mayer v. City of Chicago,* 404 U.S. 189 (1971); *Baxstrom v. Herold,* 383 U.S. 107 (1966); *Jackson v. Indiana,* 406 U.S. 715 (1972); *Humphrey v. Cady* 405 U.S. 504 (1972); *see also Groppi v. Wisconsin,* 400 U.S. 505 (1971) (no distinction allowed between felony and non-felony defendants with regard to change of venue).[19] Significantly,

[19]Respondent critizes petitioner's Equal Protection argument as overlapping its Due Process point. R.B. 51-52. While the Court may find Alabama's law unconstitutional on Equal Protection grounds without also finding a Due Process violation, the fact is that these concepts are interrelated and the Court has in the past found discriminatory deprivations of procedural safeguards to violate Due Process as well as Equal Protection. *See* Mayer, *supra,* 404 U.S. 189, 193.

respondent does not even attempt to distinguish this Court's Equal Protection rulings involving procedural safeguards (set forth at P.B. 65-67), all of which are compelling precedents for a decision that Alabama's law violates the Equal Protection Clause no matter what standard of review is applied. Equal Protection plainly calls for criminal procedures which allow no invidious distinctions between capital and non-capital defendants, particularly where the capital defendant is deprived of an historically important safeguard available to all other defendants. *See Mayer, supra,* 404 U.S. at 195-96.

IV.

RESPONDENT CONCEDES THAT THE EVIDENCE SUPPORTED A VERDICT OF GUILT ON A LESSER-INCLUDED NON-CAPITAL OFFENSE.

Respondent has conceded that "if it had not been for the preclusion clause in Alabama's [death penalty] statute, lesser included offense instructions would have been given" (R.B. 78) to the jury at petitioner's trial on the issue of guilt. Specifically, respondent stated that because petitioner denied that he killed the victim of the robbery, and also denied that he in any way facilitated that killing, there was enough evidence "to have supported lesser included non-capital offense instructions for the crimes of first degree murder and robbery had such instructions not been precluded by the statute." R.B. 79. These concessions answer an important part of the question posed by the Court on the grant of certiorari. A. 63.

CONCLUSION

For the reasons stated here and in our main brief, the judgment of the Supreme Court of Alabama affirming petitioner's conviction and sentence of death should be reversed.

Respectfully submitted,

DAVID KLINGSBERG
425 Park Avenue
New York, New York 10022
Tel. (212) 759-8400

Attorney for Petitioner

Of Counsel:

JOHN A. HERFORT
JAY WISHINGRAD
Kaye, Scholer, Fierman,
Hays & Handler
425 Park Avenue
New York, New York 10022
Tel. (212) 759-8400

JOHN L. CARROLL
Southern Poverty Law Center
1001 South Hull Street
Montgomery, Alabama 36102
Tel. (205) 264-0286